Supreme Court, U.S.
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No. 93-717

In the Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL G. TYSON,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Indiana,
Second District

PETITONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S STATEMENT

The State of Indiana repeatedly distorts the record, attempting to make it appear that this was an open and shut case, with no real question as to Michael Tyson's guilt or innocence. The case was both legally and factually close at every stage of the proceedings. The original jury vote was 6 to 6; the Court of Appeals decision was 2 to 1; and the Supreme Court's denial of review was 2 to 2. Indeed, Justice Jon D. Kruhalik of the Indiana Supreme Court characterized the case as presenting "a very close issue," and disclosed that two Justices believed that a new trial should be granted.[1] The closeness of the case makes particularly significant the State's advantage of having chosen the judge who rendered the rulings, upheld

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[1] The Indianapolis Star, Sept. 23, 1993, p.1 and 2.

on appeal as not an abuse of discretion, which form the basis of Points II, III and IV of the Petition.

The closeness of the case is also demonstrated by the State's own examples of the "considerable" evidence. Brief in Opposition at 2 (hereinafter "Br. Opp."). Upon examination of the record, the evidence it relies on cuts the other way.[2]

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[2] The State insists that there was "physical" and "medical" evidence of forcible rape, but there was no physical evidence of bruises or other injury. And the medical evidence -- testimony about only two tiny abrasions on Washington's introitus (the entry to the vagina) -- was consistent with consensual sex. (R.4680-83)

The State's reliance on the testimony of limousine driver Virginia Foster is equally specious and particularly offensive. While the State relies on Foster's testimony about Washington's appearance and demeanor after she left Tyson's hotel room (and had argued to the jury that Foster's testimony should be given weight in its deliberations), the State fails to indicate that, because of an evidentiary ruling, the jury never heard Foster's real view that Washington had <u>not</u> been raped. (Dep. Test. of Virginia Foster, Jan. 10, 1992

I. THE PROSECUTOR'S SELECTION OF THE TRIAL JUDGE PRESENTS AN ISSUE WORTHY OF THIS COURT'S CONSIDERATION

Certiorari should be granted to resolve whether the due process requirement of a "fair trial in a fair tribunal," In re Murchison, 349 U.S. 133, 136 (1955), is met when the prosecutor has selected the trial judge who will preside over a criminal case. The State of Indiana does not dispute that it chose the trial judge[3] -- it

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at 161; R.3666-67)

Even more offensive, however, is the State's creation of a "contradiction" between Tyson's grand jury testimony and his testimony at trial. Tyson testified at trial that he told Washington, after meeting her, "I want to f--- you." (The singer Johnny Gill confirmed at trial that Tyson said just that to Washington. R.5108) In the grand jury, Tyson did recount the conversation in which he told Washington, in no uncertain terms, that he wanted a sexual relationship with her; he merely declined to use the "F" word. (Grand Jury Test. of Michael G. Tyson, Aug. 30, 1992 at 76)

[3] The Court of Appeals found that under the existing system the prosecutor controls "the assignment of

claims the power, unfettered by the Constitution, to do so. It argues, however, that review should be denied because this case does not present an issue of "widespread national importance, of the type that usually impels the Court to grant certiorari." (Br. Opp. at 7)

Whether the judiciary must be independent from the will of the executive is a question of widespread national importance, as this Court's recent decision in Weiss v. Hernandez, 114 S.Ct. 752 (1994) makes clear. At issue in Weiss was whether what is traditional in the civilian context -- a judge independent of the executive -- is constitutionally required in the military context. The issue in this case is whether what is traditional in the civilian context is also constitutionally mandated in the

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a case to a particular judge." (A-100)

civilian context. As Justice Scalia noted in his Weiss concurrence, the independence of the judiciary is not only a fundamental principle, but one of the grievances against King George III recited in the Declaration of Independence. 114 S.Ct. at 771 (Scalia, J., concurring).

The issue presented by this petition is no less important because Marion County chose, three weeks after Tyson filed his petition for certiorari, to abandon its unwritten, unconstitutional system. The specific method used in a specific county to grant the prosecutor the ability to select the trial judge is not key to the issue here. Selection of criminal trial judges by prosecutors is not unique to Marion County. Throughout Indiana, the allocation of criminal cases to judges in multi-judge counties is, apparently, for the most part, not

the subject of written rules of procedure, and apparently, in some counties, the prosecutor can still pick a particular trial judge for a particular case.[4]

Moreover, nothing prevents Marion County from reinstating its prior system. Indeed, the State argues that, in the absence of a specific and individualized showing of bias or prejudice by the prosecutor's hand-picked judge, a defendant has no standing to object to the selection of

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[4] The State does not even suggest that the special grand jury system used by the prosecutor in this case is not now available elsewhere in Indiana. Nor does the State claim that the alternative method of judge selection used by Marion County prosecutors is not presently in use elsewhere in Indiana. Under that method, as the State argued in the Court of Appeals, it could have picked Judge Gifford by manipulating the system. In Marion County, cases were assigned by lots of 50. As the State argued below, "by inquiry, it is possible for one to learn which court is currently receiving cases and how far into the lot of 50 the assignment has progressed." (State's Brief at 47)

the judge by the prosecutor. Implicit in that position is the view that, if certiorari is denied, other counties can continue their practices and Marion County can immediately revert to its prior system with impunity.[5]

Finally, the State argues that, since, under a random selection system, Judge Gifford may have been selected to preside over his case, petitioner cannot object because she was selected

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[5] The State defends its selection of the trial judge by noting that petitioner acknowledged when he first objected to the system that he could not show that Judge Gifford was biased. But the issue here is not whether the prosecutor can constitutionally pick a judge who is "biased." Rather, the issue is whether a prosecutor can constitutionally pick the judge it most wants for the case. And this case amply illustrates the danger in such a system. As was to be expected, the prosecutor selected a former rape prosecutor whose views on the rape shield law and other rape related issues were well known. And, as was to be expected, given that the prosecutor could control the future assignment of cases before Judge Gifford, every significant ruling went in the prosecutor's favor.

by the prosecutor. The State's position is absurd. Surely the State is not arguing that no gambler could be heard to complain that the house fixed a roulette wheel to stop at a particular number simply because the wheel could have stopped on that number by chance.

II. THE STATE'S RESPONSE ITSELF ESTABLISHES THE NEED FOR GUIDANCE REGARDING WHEN THE SIXTH AMENDMENT PERMITS THE EXCLUSION OF DEFENSE WITNESSES AS A DISCOVERY SANCTION

The State asserts that the only question this case involves is whether the Sixth Amendment allows a trial court to exclude "non-vital and cumulative testimony based on a breach of a clear discovery obligation that caused prejudice to the prosecution, where allowing the testimony would require a continuance of possibly several weeks in the middle of the prosecution's case." (Br. Opp. at 13)

The record undercuts every single clause of that description.[6] Words do have meaning. And the constitutional right of a criminal defendant to present a defense cannot be made to disappear simply by calling evidence "non-vital" or "cumulative" or discovery obligations "clear", when they are no such thing under any reasonable or previously accepted definition of those terms.

As the dissent below explained, there was no breach of any discovery order or obligation, let alone a clear one. (A-112-13) "Not only was there no discovery order breach, there was no delay, substantial or otherwise." (A-113)

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[6] The State's assertion that allowing the witnesses' testimony would have required a continuance of several weeks is hypocritical. The State has never explained why it was entitled to several weeks to deal with the new witnesses while the defense, which took a day, took too long.

No breach could occur unless the defense, which, as the trial court found, acted in good faith, was under an obligation to disclose the witnesses without interviewing them or while significant questions as to their credibility existed. The imposition of such an obligation would raise serious Constitutional questions.[7]

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[7] As the dissent recognized:

> Defense counsel had a duty to make reasonable investigation before seeking to add witnesses. Furthermore, for defense counsel to prematurely and without investigation advise the prosecutor of witnesses who might well provide evidence against the defendant would be a breach of the ethical duty to one's client. (A-113)

The State faults petitioner for not explaining how the late-emerging witnesses could have been "potentially inculpatory." Plainly, however, until their story was checked and their credibility assessed, defense counsel could not presume that they could safely be disclosed to the State without jeopardizing Tyson's rights. Had the women witnessed anything that corroborated Washington's versions of

The State's brief is likewise dishonest in its reliance on the majority's "finding" that the excluded testimony was not "vital" to Tyson's defense, and was cumulative. Notably, the State carefully avoids any mention of the theories upon which the evidence was found to be non-vital. Against all law and logic, the majority held that evidence of Tyson's and Washington's interaction with each other just prior to entering the hotel room was irrelevant as substantive evidence, even though the defense was consent or reasonable belief as to consent. (A-32-36) The majority held that the excluded testimony would have been admissible only to impeach Washington, and, as impeachment evidence, the

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the events, they were potentially inculpatory. Alternatively, had it been determined that they were phony witnesses, like the witnesses in Taylor v. Illinois, 484 U.S. 400 (1988), that would have been inculpatory too.

majority deemed it cumulative. (A-36) As the dissent made clear, this conclusion rests on an unwarranted expansion of the definition of cumulative and on the startling notion that once a witness -- even the critical complaining witness -- has been contradicted or impeached as to any part of her testimony, all other contradiction or impeachment is "cumulative." (A-120-129) And even if that were so, it still would not address Tyson's claim that, in addition to impeaching Washington, the excluded testimony -- which was consistent with his version of the events immediately preceding the couple's seclusion in his hotel room -- corroborated his testimony about an event about which no one other than he had testified.[8]

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[8] The importance of the excluded testimony cannot be vitiated through invocation of the word "cumulative" -- especially where the prosecutor argued to the jury that Tyson should not be

III. THERE IS NO "ADEQUATE AND INDEPENDENT GROUND" BARRING REVIEW OF THE IMPORTANT RAPE SHIELD ISSUE

The State argues that this Court cannot review the Court of Appeals' "rape shield" ruling because that Court, in addition to deciding the merits, also held that Tyson had failed to preserve the issue for appellate review by failing to make an offer of proof during the trial. This, the State claims, provides an "adequate and independent state law ground" barring federal review. (Br. Opp. at 13)

To understand why the State's argument must fail, it is necessary to understand precisely what took place below. Before trial, the State moved in limine to exclude certain evidence.

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believed because of a dearth of corroboration, and where the State argues to this Court that Washington's story should be accepted specifically because "it was corroborated by four witnesses who each testified that [she] had told them that Tyson had raped her." (Br. Opp. at 2)

Tyson also moved, pursuant to the State's rape shield statute (A. 167), to introduce evidence of Washington's prior sexual history. The trial court granted the State's motion and denied Tyson's motion. (R. 1004)

Tyson appealed both rulings to the Court of Appeals. The State argued that Tyson had failed to preserve the motion in limine issues because he did not seek to introduce the excluded evidence during the trial. But, significantly, the State did not argue that Tyson had similarly waived the issues raised by his own rape shield motion. This is undoubtedly because the Indiana rape shield statute, which contains elaborate and mandatory procedures for obtaining pretrial review of "rape shield" evidence, does not require a defendant to offer the excluded "rape shield" evidence during the trial itself. Moreover, no Indiana

court had ever held that a defendant, who complied with the rape shield statute, had failed to preserve his rape shield issue on appeal.

Yet this is just what the Court of Appeals did here. On its own initiative, the Court of Appeals constructed a new procedural hurdle over which a defendant must leap before he can seek appellate review of a "rape shield" ruling and then, without any warning, and in disregard of Tyson's due process rights, applied its new rule retroactively to Tyson, who had done everything required under existing law to preserve his right to appeal. The Court of Appeals' decision is itself unconstitutional and, therefore, cannot constitute an "adequate" state ground.[9]

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[9] A federal court is precluded from reviewing state decisions that rest on adequate and independent state grounds because, if, after review by the federal court of the federal

Moreover, as this Court has often held, a "state procedural rule is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" Hathorn v. Lovorn, 457 U.S. 255, 262 (1982), quoting Barr v. City of Columbia, 378 U.S. 146, 149 (1964). Until this case, Indiana has never applied a procedural bar to a defendant who has scrupulously followed the statutory procedure for obtaining review of "rape shield" evidence.[10]

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issues, the "same judgment would be rendered by the state court," the court would be rendering an advisory opinion. Herb v. Pitcairn, 324 U.S. 117, 126 (1945); Coleman v. Thompson, 111 S.Ct. 2546, 2554 (1991). But, if the ruling on state law is itself unconstitutional, the state court could not render the same judgment after federal review.

[10] The State now argues that applying the offer of proof rule in the rape shield context is not "novel" (Br. Opp. at 16), but cites only one case, Trevino v. State, 428 N.E.2d 263 (Ind. App. 1981), involving the state's rape shield statute. Trevino, however, involved a State's motion in limine to exclude evidence. Unlike Tyson, the defendant had not followed the

For this reason too, the asserted state ground is not "adequate."

IV. THE INSTRUCTION ISSUES WERE NOT DECIDED ON STATE LAW GROUNDS AND RAISE CONSTITUTIONAL CONCERNS DESERVING OF REVIEW

Although there was evidence to support the defense instructions on mistake of fact and reasonable belief in consent, the majority of the Court of Appeals, acting as a fact-finder and crediting Washington's testimony, "found" otherwise. The State contends that this "finding" involved nothing more than an application of Indiana state law on the mistake of fact defense, and that the majority's decision, therefore, rested "entirely on state-law grounds." (Br. Opp. at 17)

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statutory scheme for seeking introduction of "rape shield" evidence. Indeed, the defendant had not even objected to the State's motion in limine. Thus, Trevino is not relevant, let alone proof of a "strictly or regularly" applied Indiana procedural rule.

That is a misreading of what happened below.

The Court of Appeals was not asked to decide what is required to establish the mistake of fact defense in Indiana. The issue before it was whether it was permissible to refuse to give the defense instructions if there was evidence to support them. The majority, however, in the words of the dissent (A-135), chose instead to "impermissibly invade[] the jury's province," and, based upon a reading of the evidence in the light most favorable to the State, "found" that no jury could conclude that Tyson had a reasonable belief that Washington had consented.

This case, therefore, squarely presents a federal issue of vital importance: does the Constitution permit a court to refuse to instruct the jury on a theory of the defense

having some foundation in the evidence, based upon the court's independent assessment of the credibility of the witness, and its own evaluation of the evidence in the light most favorable to the State. We submit that, as a matter of constitutional law, it does not. Whipple v. Duckworth, 957 F.2d 418, 423 (7th Cir.), cert. denied, 113 S.Ct. 218 (1992).[11]

The majority's standard for determining whether a defense instruction must be given subverts the jury's pivotal role in the fact-finding process and gives the court, and not

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[11] The State misinterprets Whipple. There, the defendant argued that Indiana had erroneously construed its self-defense statute because it had interpreted imminent to mean immediate. It was this state law holding that the Seventh Circuit refused to review. The Court, however, made clear that there is a constitutional right to a defense theory instruction supported by even weak, insufficient, or inconsistent evidence. However, as the defendant apparently conceded, he had offered no evidence of an immediate threat.

the jury, the ultimate power to assess the credibility of the witnesses. Whether such a standard offends the Fifth or the Sixth Amendment is an important question not yet settled by this Court and clearly deserving of this Court's review.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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